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No. 01-455

IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR JOHN K. CASTLE, et al. AS AMICI CURIAE SUPPORTING PETITIONERS

JOHN C. MILLIAN
Counsel of Record
MARK A. PERRY
PAUL BLANKENSTEIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

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QUESTION ADDRESSED BY AMICI

The second question on which this Court has granted certiorari is "[w]hether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans." The government has asserted, as an ostensible "antecedent" to the resolution of this question, that petitioners' takings claims cannot be maintained independently of their claims for breach of contract. Opp. 16. *Amici* address the question inherent in this argument, *viz.*: Whether the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Takings Clause.

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BRIEF FOR JOHN K. CASTLE, et al. AS AMICI CURIAE SUPPORTING PETITIONERS

John K. Castle, *et al.* respectfully submit this brief as *amici curiae* supporting petitioners.*

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to our Constitution provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

* Pursuant to this Court's Rule 37.6, *amici* represent that counsel for a party did not author this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICI AND SUMMARY OF ARGUMENT

1. *Amici* John K. Castle, *et al.* are the named plaintiffs in a pending lawsuit in which they allege that the government both committed a breach of contract and engaged in an uncompensated taking by enacting and enforcing legislation (the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA")) that, *inter alia*, abrogated certain rights *amici* had secured by a contract with the government. *Castle* v. *United States*, 42 Fed. Cl. 859 (1999) & 48 Fed. Cl. 187 (2000), *appeals pending*, Nos. 01-5047 & 01-5050 (Fed. Cir. argued Dec. 7, 2001).** The trial court in *Castle* agreed that the enactment of FIRREA, and its subsequent implementing regulations, resulted in a compensable breach of *amici*'s contract with the government. 48 Fed. Cl. at 216; *see*

** In addition to Mr. Castle, *amici* are Leonard M. Harlan, Donald C. Carter, Double S&M Partnership, Grace & Green Arbitrage Partners, Hudson Valley Partners, L.P., Dan W. Lufkin, MCI Two Investment Limited Partnership, Robert Marston, McD Merger Arbitrage Fund, Ltd., L.T. Foster, Northern Trust Co., Trust #2-67917 (Kate T. Foster Trust FBO), R.C. Foster, Northern Trust Co., Trust #2-67918 (Kate T. Foster Trust FBO), J.R. Foster, Northern Trust Co., Trust #2-67919 (Kate S. Thompson Trust FBO), Public Service Resources, Society Bank & Trust-Trustee, Zane Tankel Partners, Robert V. Dolan, M.D., Leo W. Kwan, M.D. Pension and Profit Sharing Trusts, Robert B. Lyons, Robert Margolis, Fosven Associates Partnership, Stanley E. Roberts, M.D., Sanwa Bank of California, Trustee, Yorba Linda Medical Group FBO Russell E. Ewing, Castle Harlan, Inc. and Cewnick Fund.

United States v. *Winstar Corp.*, 518 U.S. 839 (1996) (holding that the government is liable for FIRREA-related breaches of contract). The trial court in *Castle* also held, however, that *amici* could not maintain an action under the Takings Clause. *See* 48 Fed. Cl. at 217-20. *Amici* have appealed the rejection of their takings claim to the Federal Circuit.

Like *amici*, petitioners have alleged that the government's enactment and enforcement of certain legislation (the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877 ("ELIHPA")) resulted both in a repudiation of their contracts with the government and in a taking of their property within the meaning of the Fifth Amendment. The courts below did not reach the merits of either claim, but instead concluded that petitioners had not filed suit within the six-year statute of limitations applicable to actions against the federal government. *Franconia Assocs.* v. *United States*, 240 F.3d 1358 (Fed. Cir. 2001), *aff'g* 43 Fed. Cl. 702 & 44 Fed. Cl. 315 (1999).

2. *Amici* have no direct interest in the resolution of the specific questions on which this Court has granted certiorari—*i.e.*, whether petitioners' causes of action accrued for purposes of 28 U.S.C. § 2501 upon the enactment of ELIHPA (as the government contends) or at some later date (as petitioners contend). *See* Order in No. 01-455 (Jan. 4, 2002) (granting certiorari limited to specified questions). In contrast to petitioners, *amici* filed their lawsuit well within six years of the enactment of FIRREA, and the government has never asserted a statute of limitations defense in *Castle*. *Cf. Plaintiffs in Winstar-Related Cases* v. *United States*, 37 Fed. Cl. 174 (1997), *aff'd sub nom. Ariadne Financial Servs. Pty.*

Ltd. v. *United States*, 133 F.3d 874 (Fed. Cir.) (addressing accrual of FIRREA-related cases), *cert. denied*, 525 U.S. 823 (1998).

Amici do have a direct interest, however, in one of the arguments the government has raised in its opposition to the petition for a writ of certiorari. With respect to petitioners' claims under the Takings Clause, the government argues, "[a]s an antecedent matter," that "petitioners' taking and contract claims are not distinct from each other." Opp. 16. The government also suggests that rights secured under a contract with the government may not be "property" within the meaning of the Takings Clause, and that "[i]nsofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide 'just compensation' under the Fifth Amendment." *Ibid.* The government has made substantially the same argument—*i.e.*, that a party to a government contract, the repudiation of which has been authorized by congressional action, cannot maintain a takings claim independently of a claim for breach of contract—in the *Castle* case that is now pending in the Federal Circuit.

Amici are in general agreement with petitioners that the government's argument concerning the availability of the constitutional remedy of just compensation in this context goes to the merits of their takings claims, rather than to the commencement of the limitations period. *See* Pet. Reply 8-9. As such, it is not within the questions specified by the Court in its grant of certiorari, and the Court could properly decline to consider it. *Cf.* this Court's Rule 14.1(a); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 122 S. Ct. 681, 694 (2002) (declining to consider argument not presented by petition). Nonetheless, the government can be expected to press this argument in its brief on the merits, presumably as an alternative ground for affirmance. *Amici* are therefore concerned that, in the event the Court reaches this argument, it be resolved correctly.

3. As *amici* explain below, the government's notion that the Takings Clause does not provide an independent remedy for the governmental action at issue in circumstances like those presented here is both erroneous and entirely unsupported by any decision of this Court. At the outset, there is no question but that rights secured under a contract with the government are property protected from uncompensated taking by the Fifth Amendment. *E.g.*, *Lynch* v. *United States*, 292 U.S. 571 (1934). Moreover, this Court's precedents make clear that the repudiation by the government in its sovereign capacity of an express promise may give rise to a claim under the Takings Clause independent of any common-law action the promisee might have for breach of contract. *E.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). And the government is simply incorrect that contract damages necessarily equal the "just compensation" required by the Constitution; on the contrary, for a variety of reasons the remedies available under the law of contracts may fall short of providing just compensation as defined by this Court. *E.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In cases where (for whatever reason) contract remedies do not amount to just compensation, the government is required by the Takings Clause to make up the "constitutional shortfall." *E.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Thus, in the event the Court reaches the substantive Takings Clause argument raised by the government and addressed by *amici*, it should make clear that the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Fifth Amendment.

ARGUMENT

"The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). It appears from the court of appeals' recitation of the facts of this case (and, for that matter, from the title of the statute itself) that Congress attempted, through the enactment of ELIHPA, to force petitioners and other similarly situated property owners to bear the costs of providing certain low-income housing rather than passing the financial burden of this program through to the general public. *See* 240 F.3d at 1361. Petitioners accordingly sued, in the alternative to their claims for breach of contract, for just compensation under the Takings Clause. Pet. 10.

In its opposition to the petition for a writ of certiorari, the government suggests that this Court need not address the accrual of petitioners' claims under the Takings Clause because the law of contracts, not the Constitution, affords the exclusive avenue of relief in these circumstances. *See* Opp. 16. This argument is premised on the government's contention that "the only 'property' that could have been taken was petitioners' contractual

prepayment right." *Id.* at 15. Petitioners dispute the government's characterization of the property right at issue, pointing out that ELIHPA impaired not only their contractual rights but also their ownership interests in the underlying real properties. *E.g.*, Pet. 28-29. This Court has made clear that, in such cases, the government must pay just compensation for the value of both tangible and intangible rights. *See Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327-30 (1893); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 690-91 (1897). In any event, the government's argument concerning the scope of the Takings Clause is incorrect regardless of the precise contours of petitioners' property (which is a question best addressed by the trial court in the first instance). *Amici* will therefore accept *arguendo* the court of appeals' characterization of the property at issue as petitioners' contractual "right to prepay their FmHA loans at any time." 240 F.3d at 1365.

1. The government purports to leave aside the question whether a contractual right "necessarily constitutes property under the Fifth Amendment," but expresses doubt as to whether "taking claims may be brought in this context at all." Opp. 16. This Court's precedents, however, admit of no doubt on that matter: Rights secured under a contract with the federal government—including petitioners' contractual rights to prepay their loans—constitute "property" within the meaning of the Fifth Amendment that cannot be taken by the government in its sovereign capacity without the payment of just compensation.

This Court has unequivocally held that "[v]alid contracts are property, whether the obligor be a private in-

dividual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). In the nearly seven decades since *Lynch*, the Court has never retreated from this clear statement; on the contrary, the principle that contractual rights are property has repeatedly been reaffirmed by this Court. *See, e.g.*, *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 135 (1974). As this Court has explained the holding of *Lynch*, "valid contracts are property within the meaning of the Taking Clause." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984). The government has offered no basis for this Court to disregard settled precedent on this point.

Similarly, this Court has long recognized that the cancellation of a "contract . . . with the government" by authorized governmental action "is an exercise of the power of eminent domain, and the liability of the government is for just compensation." *De Leval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 71 (1931). Again, this Court has never disavowed the principle that the government must pay just compensation for taking rights secured by contract, whether public or private. *See, e.g.*, *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 601-02 (1935); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123-26 (1924). Contrary to the government's intimation, this Court's precedents thus clearly establish that "taking claims may be brought in this context." *See* Opp. 16.

Indeed, the sole authority of this Court cited by the government in this section of its opposition—tellingly, as "but cf." (Opp. 16)—answers the question raised by

the government in favor of petitioners: "Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.16 (1977). As property, contract rights, like other intangible rights, are protected against uncompensated takings by the Fifth Amendment. *Monsanto*, 467 U.S. at 1003-04; *Armstrong*, 364 U.S. at 48-49. In the event the government in its sovereign capacity takes such property and fails (or refuses) to compensate the owner, the Takings Clause affords a remedy. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 5 & n.6 (1984); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). Thus, the government errs in implying that petitioners may not be able to maintain claims under the Takings Clause for the government's abrogation of their contractual rights.

2. The government next contends that "petitioners' taking and contract claims are not distinct from each other." Opp. 16; *see also ibid.* ("petitioners' taking claims are . . . entirely parasitic on their contract claims"). This argument is also squarely foreclosed by this Court's precedents.

The Court made clear in *Monsanto* that the government's breach of promise gives rise to a claim under the Takings Clause. There, the Court held that an "explicit governmental guarantee" of confidentiality gave rise to a reasonable, investment-backed expectation that data submitted to the government would be maintained in confidence. 467 U.S. at 1011. The government's repudiation of that promise by releasing the data was remediable under the Takings Clause. *Ibid.*; *see also Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979) (implicit governmental promise gave rise to reasonable

expectation protected by Takings Clause). So, too, here: The government's promise that petitioners could prepay their loans may well have given rise to legitimate expectations, protected by the Takings Clause against government interference, that they would, in fact, be allowed to prepay their loans.

The government has previously argued that *Monsanto* is distinguishable on the ground that a party to a government contract can reasonably expect only that the government will pay contract damages in the event of a breach. This contention is irreconcilable with *Lynch* and other cases in which this Court has held that the government may be held liable under the Takings Clause for abrogating contractual rights, as discussed above. That the promise in *Monsanto* was made pursuant to statute, whereas the promise in this case was made pursuant to a contract authorized by statute, is not a difference with any constitutional significance. The *Monsanto* plaintiff could have sued the government for breach of contract on the same facts. *See Airborne Data, Inc.* v. *United States*, 702 F.2d 1350 (Fed. Cir. 1983). The *Monsanto* Court nowhere suggested that the availability of an alternative contract remedy that does not itself provide just compensation within the meaning of the Takings Clause could possibly preclude the recovery of just compensation in the event of a governmental taking. But that is effectively the rule that the government is urging on the Court.

Acceptance of the government's reasoning would lead to the absurd result that citizens who received non-contractual promises from the government (as in *Monsanto* and *Kaiser Aetna*) would receive more constitutional protection than those (like petitioners) who in-

sisted that the government formalize its promises by contract. To reach such a result, the Court would have to conclude that petitioners, by signing their loan agreements, implicitly waived the protections afforded them (like all citizens) by the Fifth Amendment. Such a conclusion would conflict not only with this Court's pronouncements that waivers of constitutional rights must be both knowing and voluntary (*e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938)), but also with the plain terms of petitioners' contracts, which nowhere include such a waiver. *See* Pet. App. 165-77.

It is revealing that the government does not (and cannot) cite a single authority from this Court for the proposition that a party to a contract abrogated by the government in its sovereign capacity cannot maintain a takings claim independent of any claim it may have for breach of contract. That is because there is no such authority. On the contrary, this Court has made abundantly clear that "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). Indeed, any effort by the government to preclude property owners from suing for just compensation would, itself, be unconstitutional. *See Preseault* v. *ICC*, 494 U.S. 1, 11 (1990); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978). Where the government, as sovereign, takes private property—including contractual rights—it is constitutionally obligated to pay just compensation.

In fact, an argument closely analogous to the one made by the government in this case has already been rejected by this Court. In *First English Evangelical Lu-*

theran Church v. *County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987), the Solicitor General had argued that "the [Fifth] Amendment itself is . . . not a remedial provision." The Court held that numerous precedents "refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' . . . [T]hese cases make clear that it is the constitution that dictates the remedy for interference with property rights amounting to a taking." *Ibid.*; *see also id.* at 316 ("in the event of a taking, the compensation remedy is required by the Constitution"). Thus, the Constitution affords petitioners a remedy wholly independent from any relief that may be available under the law of contracts.

Any doubt on this score is laid to rest by this Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). There, a discharged public employee sued for deprivation of property (his job) without due process; the State countered that he had received all the process he was due because the statutory procedures had been followed. This Court held that since the right to due process is conferred not by legislative grace, but by the Constitution, the answer to the question what process is due "is not to be found in the statute," but rather in the Fifth Amendment itself. *Id.* at 541. To that end, the Court rejected the argument, akin to the one advanced by the government in this case, that since the employee's property interest in his job was established by a statute that also prescribed a remedy for the deprivation of that interest, the only process that was due was set out in the statute. Instead, the Court held that once a property interest has been established, the Constitution specifies the remedy.

The same reasoning applies here: The remedy for a governmental taking of property—including rights secured by a contract—is provided not by statute or the common law of contracts, but by the Constitution itself. *Cf. Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation"). Accordingly, the question of what compensation is just cannot be resolved by reference to an external source of remedial law but rather by the plain terms of the Fifth Amendment, which mandates that the government pay "just compensation" when it acts in its sovereign capacity to take private property.

3. The government asserts that "[i]nsofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide 'just compensation' under the Fifth Amendment." Opp. 16. This assertion can be correct only where contract remedies amount to just compensation, which has not yet been established in this case and, for a variety of reasons, may not be established in other cases in which the government in its sovereign capacity takes contractual rights.

a. For a variety of reasons, application of the law of contracts might yield a different monetary award than the Fifth Amendment. To state the obvious, the available remedies—just compensation under the Constitution; protection of the promisee's expectancy, reliance, or restitutionary interests in contract—are divergent. *See, e.g.*, *Russell Motor Car Co.* v. *United States*, 261

U.S. 514, 523-24 (1923). Whether petitioners ultimately will be able to recover more or less under the law of contracts than they may be entitled to under the Takings Clause depends on a variety of factors (such as the evidence, the parties' litigation strategies, and the trial court's rulings on numerous factual and legal issues) that have yet to be determined. Thus, it cannot be said at this stage of the litigation, as the government blithely does, that petitioners' contract remedies necessarily will amount to just compensation.

To be sure, in the event petitioners were to recover an amount, as contract damages, that equals or exceeds the constitutional requirement of "just compensation," petitioners could not also recover directly under the Constitution. That is because "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation; then the property owner has no claim against the government for a taking." *Preseault*, 494 U.S. at 11. In such a case, petitioners' property interests might well be "fully protected by an ordinary breach-of-contract suit." *Lujan* v. *G&G Fire Sprinklers, Inc.*, 121 S. Ct. 1446, 1451 (2001).

By the same token, however, in the event petitioners' contractual damages are ultimately determined to be less than the amount that would constitute just compensation under the Constitution for any property taken from them by the government in its sovereign capacity, the Takings Clause remedy remains available to "cove[r] any shortfall between [the alternative] remedy and just compensation." *Monsanto*, 467 U.S. at 1018. The law is quite clear that the Takings Clause applies even if some other remedial scheme exists, and if the other remedy does not

afford the litigant just compensation, the Constitution requires the government to make up the "constitutional shortfall." *Regional Rail Reorganization Act Cases*, 419 U.S. at 156; *see also Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

Where the federal government in its sovereign capacity acts to abrogate contractual rights, it could well be that litigants' contract remedies do not amount to just compensation. For example, the United States is generally immune from paying interest on awards in contract actions. *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 (1986). The Takings Clause, however, requires that the government pay interest as an element of just compensation. *Id.* at 317 n.5; *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938). Thus, all other things being equal (*e.g.*, if the trial court were to award as contract damages precisely the value of the property rights taken from petitioners by the government), the passage of time entailed in litigation would itself create a "constitutional shortfall" for which the Constitution would require compensation (assuming, of course, that the other requirements of a takings claim have been met).

The government has previously argued that the *Winstar* Court's recognition that a contract promisee is entitled either to performance or to damages for nonperformance (*e.g.*, 518 U.S. at 868-69) somehow forecloses a party to a government contract from asserting claims under the Takings Clause. Any such contention must fail. Neither the law of contracts nor the Takings Clause precluded the government from restricting petitioners' contractual rights; the government's decision to do so, however, gives rise to cognizable claims for both

contract damages and just compensation. *Compare id.* at 868, 870 (while contract did not "bar the Government from changing the way in which it regulated," subsequent legislation meant "the Government was unable to perform the promise and, therefore, became liable for breach"), *with First English*, 482 U.S. at 315 (Takings Clause is designed "not to limit the governmental interference with property *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking"). While the *Winstar* plurality correctly observed that "damages are always the default remedy *for breach of contract*" (*id.* at 885 (emphasis added)), the Court did not purport to address what remedy would be available in the event of a taking of contractual rights by the government in its sovereign capacity. To the extent contract damages do not amount to just compensation, petitioners retain the constitutional right to pursue the constitutional remedy.

Since the Takings Clause is self-executing (*e.g.*, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)), the government cannot, by consenting to be sued under a regime that does not yield just compensation (as a breach of contract suit might not), preclude a plaintiff whose property has been taken from obtaining the relief provided for by the Constitution. An alternative scheme that does not afford an equivalent remedy cannot trump the constitutional requirement. *Loudermill*, 470 U.S. at 541; *cf. Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226-27 (1995). Thus, because the law of contracts might not afford petitioners the just compensation that they would be due in the event of a proven governmental taking, petitioners may pursue their claims under the

Takings Clause independently of their claims for breach of contract.

b. The lower court decisions cited by the government are not to the contrary. *See* Opp. 16 (citing *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269 (1992), and *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332 (1989)). The government is presumably referring to the *Sun Oil* court's statement that "the concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." 572 F.2d at 818 (citation omitted); *see also Marathon Oil*, 16 Cl. Ct. at 338-39 (same). But, read in the proper context (which the government ignores), that statement has no applicability to the circumstances presented by this case.

Amici have no quarrel with the general principle, articulated in *Sun Oil*, that a party to a contract with the government *generally* may maintain only an action on the contract in the event of repudiation or breach, and cannot resort to the Takings Clause. That principle is not based, however, on either the merger or the mutual exclusivity of the two rights (as the government misleadingly suggests in its opposition), but rather on the character of the governmental action at issue.

The *Sun Oil* decision is based on the inarguable proposition that "[a] taking can occur only when the Government acts in its sovereign capacity," as distinguished from its proprietary capacity. *Gratz* v. *United States*, 25 Cl. Ct. 411, 420 (1992); *see, e.g.*, *United*

States v. *Hooe*, 218 U.S. 322, 335-36 (1910). When it enters into and repudiates or breaches contracts with private parties, the government frequently acts solely in its proprietary rather than its sovereign capacity. *See*, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949). For this reason, "[t]akings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity." *Hughes Communications Galaxy, Inc.* v. *United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). *Sun Oil* is a textbook illustration of this dichotomy.

At issue in *Sun Oil* was whether the Secretary of Interior's decision to deny several oil companies' request to construct a drilling platform, which decision had already been held to constitute a breach of the plaintiffs' lease contract with the government, also amounted to a taking. The Court of Claims' holding that no taking had been effected was based on its conclusion that the government was acting in its proprietary, rather than its sovereign, capacity: "[The government's] lease operations . . . represent activity by it in a proprietary capacity rather than a sovereign capacity. . . . Remedies for violation of any of their lease rights by plaintiffs must be directed at [the government] in its proprietary capacity and not in its sovereign capacity." 572 F.2d at 818. The other cases cited by the government in this regard similarly turn on the sovereign/proprietary distinction, not (as the government would have it) on the unavailability of a Takings Clause remedy in cases involving government contracts. *See*, *e.g.*, *Transpace Carriers*, 27 Fed. Cl. at 274 ("NASA acted in its proprietary capacity, not a sovereign capacity, in negotiating with TCI for the

transfer of the Delta program. Thus, TCI's remedy must be directed at NASA in its proprietary capacity, through the contract vehicle.").

In contrast to the situation in *Sun Oil* and like cases, where the government was acting only in its proprietary capacity in entering into and subsequently breaching the contracts at issue (as will often be the case with respect to government contracts), this Court has long recognized that the contractual relationships of the United States with its citizens may also involve the government acting in its sovereign capacity. *See*, *e.g.*, *Winstar*, 518 U.S. at 876 (plurality opinion); *Perry* v. *United States*, 294 U.S. 330, 350-54 (1935). When the government acting in its sovereign capacity repudiates or breaches a contract, it may be held liable for just compensation under the Takings Clause. *See*, *e.g.*, *Russell Motor Car*, 261 U.S. at 518-20. Indeed, Congress has previously recognized the government's constitutional obligation to pay just compensation for contracts abrogated as a result of subsequent legislation (*i.e.*, sovereign action). *See Hedstrom Lumber Co.* v. *United States*, 7 Cl. Ct. 16, 21 (1984).

The Court of Claims in *Sun Oil* recognized that the abrogation of contracts by the government in its sovereign capacity can give rise to liability under the Takings Clause. As the court explained, "[t]he significant fact in the *Lynch* case is that *congressional* action abrogated the contracts in issue thereby giving rise to a taking by authorized governmental action." 572 F.2d at 819 n.49. That is because an Act of Congress—such as ELIHPA or FIRREA—is indisputably an exercise of the sovereign power that must conform to the dictates of the Constitution. A litigant in the position of petitioners can therefore sue the government both for breach of contract

and for just compensation. *See, e.g., Prudential Ins. Co.* v. *United States*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986); *Far West Federal Bank, S.B.* v. *OTS*, 746 F. Supp. 1042, 1050-51 (D. Ore. 1990), *vacated on jurisdictional grounds*, 951 F.2d 1093, 1100 (9th Cir. 1991).

In this regard, the government might attempt to seize upon petitioners' statement that "the government was not acting in its capacity as the sovereign when it enacted ELIHPA." Pet. 16. Any such argument, however, would confuse the truism that the enactment of legislation constitutes action by the government in its sovereign capacity (the pertinent issue for purposes of takings analysis) with the so-called "sovereign acts" doctrine that may sometimes apply in government contract actions (the context in which *amici* understand that petitioners made the referenced statement). *But see* Opp. 12-13 n.4 (conceding that the "sovereign acts" doctrine is not implicated here). For example, while the "sovereign acts" doctrine has been deemed inapplicable to FIRREA (*Winstar*, 518 U.S. at 891-96 (opinion of Souter, J.)), "it was an unquestionably sovereign act of government—enactment and implementation of provisions of FIRREA regarding treatment of regulatory capital—that gave rise to respondents' claims for breach of contract." *Id.* at 920 (Scalia, J., concurring in judgment).

Thus, governmental action—such as the enactment and enforcement of ELIHPA in this case—may well be considered "sovereign," and subject to redress under the Takings Clause, regardless of whether it may be defended, as a matter of contract law, under the "sovereign acts" doctrine. *See Winstar*, 518 U.S. at 878-79 n.22 (plurality opinion). This follows from the rule that "the

actions of the government representative on which a taking claim is premised must be authorized[,] either expressly or by some necessary implication, by some valid enactment of Congress." *Sun Oil*, 572 F.2d at 819; *see, e.g., United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 333 (1920). In this case, it is undisputed that the governmental action petitioners ultimately challenge—FmHA's refusal to accept prepayment of their loans—was expressly authorized by ELIHPA, an enactment of Congress. The sovereignty predicate for a takings claim is thereby established.

The government has previously argued that the takings remedy is unavailable in contract actions because "'[t]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other.'" *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 187 n.9 (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). As Justice Scalia noted in *Winstar*, however, this Court's decision in *Horowitz* is at best a suspect precedent. *See* 518 U.S. at 923 (opinion concurring in judgment). Moreover, the quoted passage, which in any event is pure *dicta* (as the government there was acting only in its proprietary capacity and no question of fusion was presented), cannot be reconciled with this Court's subsequent decision in *Lynch*, which involved the government acting in both its proprietary capacity (as administrator of the war risk insurance program) and its sovereign capacity (as overseer of the federal fisc). *See* 292 U.S. at 575. More importantly, the *Winstar* plurality concluded, in the context of FIRREA, that "the Government's 'regulatory' and 'nonregulatory' capaci-

ties"—its sovereign and proprietary characters—"*were fused* in the instances under consideration." 518 U.S. at 894 (emphasis added). The plurality also recognized that "such fusion will be . . . common in the modern regulatory state." *Ibid.*

It appears that ELIHPA, a statute by which Congress expressly set out to repudiate contractual promises previously made by the government, is another example of the type of "fusion" of governmental roles that, in contrast to the *dicta* in *Horowitz*, the *Winstar* plurality expressly acknowledged. The government, in choosing to restrict FmHA's ability to accept prepayments, acted simultaneously in both its proprietary capacity (as lender) and its sovereign capacity (as sponsor of low-income housing in rural areas). The government's enactment and enforcement of the statute thus constitutes sovereign action that may be independently remediable under the Takings Clause notwithstanding any remedies petitioners might have available against the government in its proprietary capacity under the law of contracts.

4. The government's merits-based argument with respect to petitioners' claims under the Takings Clause is thus incorrect in all of its facets. The government has not cited any decision of this Court that supports any of the points made at page 16 of its opposition to the petition for a writ of certiorari. Indeed, this Court's precedents squarely rebut the government's contention that petitioners may not maintain takings claims independently of their claims for breach of contract.

Although *amici* have no direct stake in the questions on which the Court has granted certiorari, the foregoing analysis also demonstrates the error in the government's entirely unsupported assertion that petitioners' claims

under the Takings Clause necessarily accrued at precisely the same moment as their claims for breach of contract. Because petitioners' takings claims are independent of their contract claims, the accrual *vel non* of each cause of action must be evaluated separately under the law applicable specifically to it. Thus, the second question on which this Court has granted certiorari should be answered, not (as the government contends) by reflexive reference to the law of contracts, but rather in accordance with this Court's Takings Clause jurisprudence—in particular, the doctrine of ripeness. *See, e.g.*, *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2459 (2001). *Amici* are in general agreement with petitioners that, because ELIHPA permits FmHA to accept prepayments in certain circumstances, their takings claims were not ripe—and thus did not "accrue" for purposes of 28 U.S.C. § 2501—unless and until they actually sought from, and were denied by, FmHA permission to prepay their loans. *Cf. Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). Petitioners should therefore be afforded the opportunity to prove up their independent claims under the Takings Clause.

CONCLUSION

For the foregoing reasons, and in the event the Court reaches the question, the Court should make clear that the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Takings Clause.

Respectfully submitted.

JOHN C. MILLIAN
Counsel of Record
MARK A. PERRY
PAUL BLANKENSTEIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

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